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IN THE
Supreme Court of the United States

October Term, 1970

No. 821

UNITED STATES OF AMERICA,
v.
GREATER BUFFALO PRESS, INC., *et al.* *Appellant,*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES

Questions Presented

1. Did the acquisition of International by Greater Buffalo in June of 1955 under the circumstances of this case constitute a violation of Section 7 of the Clayton Act, especially in the light of the easy access to the relevant market on the part of newspapers and others?

(The subsidiary questions designated 1a and 1b at page 2 of the Government's brief are involved in, but, not vital to a determination of this question.)

2. If the challenged acquisition violated Section 7 of the Clayton Act, whether any divestiture, and particularly a divestiture of a new plant built five years *after* the acquisition by Greater Buffalo for its wholly-owned subsidiary Dixie Color, is appropriate or lawful?

Introduction

The case at bar although aimed principally against Hearst Corporation was commenced in January 1961 with a compendium of charges against the defendants Greater Buffalo Press, Incorporated (hereinafter sometimes referred to as "Greater Buffalo"), the Hearst Corporation (hereinafter alternately referred to as "Hearst" or "King" because it was through its unincorporated division King Features Syndicate that Hearst functioned in the matters and things involved in this litigation), Newspaper Enterprise Association, Inc. (hereinafter sometimes referred to as "NEA"), International Color Printing Company (hereinafter sometimes referred to as "International"), Southwest Color Printing Corporation (hereinafter, to the extent mentioned, referred to as "Southwest"*) and Dixie Color Printing Corporation (hereinafter sometimes referred to as "Dixie Color") (App. 4-6**).

The complaint charged that the defendants Greater Buffalo, Hearst and NEA, together with an alleged co-conspirator, Eastern Color Printing Company mentioned only in passing at the trial, had unlawfully conspired to restrain trade and commerce in violation of Section 1 of the Sherman Act; that these same defendants had conspired to monopolize the sale and printing of color comic supplements and had monopolized such sale and printing in violation of Section 2 of the Sherman Act; more importantly, that Hearst and NEA (not Greater Buffalo) were each parties to tying arrangements involving the licensing of color comic features and the sale of color comic supplements with the printing thereof in violation of Section 3 of the Clayton Act. Lastly, the complaint charged a vio-

* Any relief against this corporation has been abandoned.

** "App." refers to appendix; "R" refers to the record filed with the Court but not included in appendix.

lation of Section 7 of the Clayton Act by Greater Buffalo resulting from an acquisition by Greater Buffalo of the stock of International in the year 1955.

The Government eliminated the monopolization charge against Greater Buffalo in its amended complaint filed in 1965 (App. 1597-1608). In August of 1965, before trial, the Government consented to a decree merely ordering Hearst to comply with the antitrust laws (App. 520-524) and allowing the continuation of the tie-in practice (Paragraph IV C App. 522). After a trial on the merits, the District Court found against the Government on all charges (App. 1691-1706) and entered a judgment dismissing the complaint (App. 1706).

The Government failed in its attempt to prove the conspiracies charged and has taken no appeal from the District Court's decision dismissing the conspiracy charges. Accordingly much of the voluminous record is irrelevant. On this appeal there remains only the narrower question of whether or not Greater Buffalo violated Section 7 of the Clayton Act in acquiring International and if it did, what relief, if any, should follow.

The confused and tortuous course of this case over a period of ten years has been marked by innumerable inconsistent and conflicting positions advanced on behalf of the Government. Although it is difficult to discern the most notable instances of such conduct, we believe that by any standard the solemn assertion of Government trial counsel oft repeated that this action was brought to "*protect*" Greater Buffalo must loom large on the roll. At App. 1041 Government trial counsel said "The primary purpose of this suit is to stop King." At App. 686 counsel said "It (the Government) is seeking to protect the right of Greater Buffalo, as Mr. Raichle said here this morning, against

the use of tie-in's; seeking to protect the right of Greater Buffalo to get a larger share of the market by its own talent and without combining with competitors to do it." At App. 686 Greater Buffalo is described as a "victim". At R. 667 counsel said "Greater Buffalo is the victim to the extent NEA and King can tie in." Granted that the complexities of present day antitrust litigation and the esoteric character of the economic plans and theories evolved by the Antitrust Division for the alleged purpose of preserving competition are beyond the ken of the ordinary businessman and those of us who are of the garden variety of practicing lawyers, we believe that it is impossible for anyone to perceive just how the relief sought in the last remnant of this action, i.e., "relief" providing for King an "alternate source of printing from Greater Buffalo" protects Greater Buffalo or the public interest.

Our inability to understand the ways of the Government was shared by the District Court. At R. 659, the court said:

"I will never forget the day I heard the case, the opening day, there were certain positions taken by the Government I never understood yet, and they changed like the twilight changes, and I never understood that."

* This statement seems to refer to the fact that a Mr. Nicht of King Feature was bringing considerable pressure upon Mr. Walter Koessler, president of Greater Buffalo, to enter into an arrangement wherein and whereby King would become the sales agent for Greater Buffalo with an agreement on the part of Greater Buffalo not to print for any other syndicate. In candor we state that there was evidence to the effect that in 1954 and after that time Mr. Koessler, conscious of the tie in power of King, was considering a surrender to such power and the entering into of such an arrangement (App. 886). This fact is reflected in many of the Nicht memoranda (Ex. P-19, App. 1440, Ex. P-20, App. 1440, Ex. P-22, App. 1443, Ex. P-102, App. 1520) and much of the correspondence between Mr. Nicht and Mr. Koessler (Ex. P-15, App. 1432, Ex. P-16, App. 1434, Ex. P-17, App. 1438, Ex. P-18, App. 1439, Ex. P-25, App. 1458). When both Mr. Koessler and Mr. Nicht were informed by counsel that such an arrangement might offend against the anti-trust law (App. 951-953, 978-979, Ex. P-17, App. 1438), their negotiations with respect to such an arrangement were terminated (Ex. D-4, Received in Evidence, App. 887, Ex. D-5, Received in Evidence, App. 888). As we have stated, the Government has not appealed from the District Court's finding that there was no conspiracy between King (Hearst) and Greater Buffalo.

** Government's brief, p. 37.

At R. 660 the District Court said:

"I could never understand—and you may say by now you should, I still don't. Anyway, I could never understand why Hearst went out . . ."

See also R. 690 for our explanation for the change, and see further the District Court's statement in its opinion:

"No reason has been presented by the Department of Justice to explain the significant change of heart toward the defendant Hearst" (App. 1692).

In any event we pass to a more detailed discussion of the case.

Genesis of the Case

Some time in the latter part of 1955 a man named Jack R. Hornaday who had been a salesman for King working under the supervision of its sales manager Frank Nicht left the employ of King and became the president of Atlantic Features and Printing, Inc., a company formed by a group of newspapers for the purpose of licensing features and selling comic supplement printing for Southern Color Print. After experiencing some initial success in taking business away from King he began to feel the pinch of the King predatory tie in practice which he himself had utilized under the tutelage of Mr. Nicht (App. 381-382). He complained through counsel that he was being seriously handicapped by King's said trade practices and threatened to go to the Department of Justice with his complaint. Later he did go to the Department of Justice and after a grand jury investigation that resulted in a no-bill this action was commenced.

Thus, the genesis of this litigation is found in the claim that the practice of King Features in combining the licensing of its copyrighted features with the sale of printing, together with the discriminatory and predatory conduct

which the leverage this tie-in made possible, had resulted in violations of the antitrust law to the detriment of Atlantic Features.

The Parties to the Acquisition

A. Greater Buffalo

Greater Buffalo is a family-owned corporation with its principal office in Buffalo, New York (App. 853). It commenced business in 1926 with an original investment of \$3,000 (App. 854). It started by printing two small neighborhood papers on a press located in a private dwelling occupied by one of the founders (App. 855). In those early days Walter Koessler who was at all times president of Greater Buffalo solicited the advertising and functioned as a reporter and editorial writer for the fledgling papers (App. 854). In or about the year 1930 Greater Buffalo purchased a used press from the Buffalo Courier-Express and proceeded to print hand bills and circulars for stores in addition to its neighborhood papers (App. 857). During the early 1930's its meager business was augmented by printing legal notices of foreclosures and the like (App. 856). In 1932 it acquired a used press from the Syracuse Herald and began to print comic sections (App. 858). Thereafter it began to print comic sections for several papers, including papers in Chicago, Buffalo and Syracuse (App. 858). All of these papers had previously printed their own comics (App. 858). During the 1930's and 1940's Mr. Koessler and his brother Kenneth, together with one other man, constituted its sales force (App. 859). In 1936 Greater Buffalo purchased a press particularly adaptable to the printing of comic sections at a cost of \$36,000 and moved into the plant which it presently occupies on Grote Street, Buffalo, New York (App. 859). Over the years

since its early beginnings all of the earnings of Greater Buffalo have been ploughed back into the business and its expansions have been made through a redeployment of its earnings (App. 859). The Koessler family, including Walter Koessler's father, his brother, his sister and the young lady who subsequently became his wife, worked to turn out its product (App. 860). Importantly, a considerable portion of the business of Greater Buffalo was so-called commercial printing unrelated to newspapers, such as circulars, advertising, catalogs, etc. for Sears Roebuck and other nationally known firms* (App. 861, 867, 881).

As Greater Buffalo grew from its modest beginnings and more and more newspapers, which had theretofore printed their own color comic supplements, began to give their business to Greater Buffalo, Greater Buffalo became aware of the awesome tie-in power exercised by King (Hearst) through its ownership of copyrights and on various occasions its prospective printing customers were told by King that if they entered into contracts with Greater Buffalo for printing the cost of licensing the features controlled by King would be increased (App. 885, 924, 956-957, 971-973, 992).

Upon inquiry from the Court as to how Greater Buffalo was able to develop and expand its business, Mr. Koessler said, "It is a form of know-how. In later times we developed better machinery, better machinery than the printing press manufacturers put on the market. Better methods of doing it so that we cut the costs and were able to compete on costs. We were also able to compete on quality, we did a better job, and we could print—we were more

*It was the subsequent placing of a large volume of this type of business at International after its acquisition by Greater Buffalo which accounted in important part for the rehabilitation and business of the International Wilkes Barre plant (App. 1123-1125)

flexible, that is, a lot of the newspapers could print eight pages or twelve pages but they could not print ten pages or fourteen pages" (App. 864).

The ability of Greater Buffalo to print a quality product at a cheaper price than its competitors is conceded by the Government at page 7 of its brief where it states that "Greater Buffalo was the most successful and efficient comic supplement printer largely because of the technical and innovative skills of its president, Koessler." The Government admits that Greater Buffalo has a "better quality product" (Jurisdictional Statement, p. 5) and that it has "a genius for efficiency" (App. 686) and "a marvelous talent for efficiency and economy" (App. 689).

B. International

International also stemmed from a small newspaper printing operation (App. 1100). It changed its earlier name to International Color Printing Company in 1924 (App. 1101) and commenced to print color comic supplements (App. 1101). Its president was and is one Joseph J. Gorman (App. 1099). International's first color comic supplement customer was King (App. 1102). In the beginning King was having its comics printed in various plants located in Kansas City, Brooklyn, Richmond and Indianapolis (App. 1102). King was at this time selling features and also "ready print." (App. 1102). Mr. Gorman described ready print as a "combination of pages, which is to be used for a number of newspapers without changing the pages as you move from paper to paper." (App. 1102). These ready prints go to a number of papers and the only change that has to be made is in the masthead (App. 1103). Over the intervening years from about 1927 until June of 1955 International printed exclusively

for King (App. 1103) and was favored with substantially all of King's business. After 1927 International had no salesman and solicited no accounts (App. 1103). Thus, as stated in the Government's brief, p. 9, International's revenues were obtained not from newspapers but solely from King under contracts. The contract in effect in 1955 was cancellable upon six months' notice (App. 1104-1117). Mr. Gorman described the relationship between International and King in some detail at App. 1104-1115. Apparently over a long period of years Mr. Nicht was critical of the lack of efficiency of the International operation (App. 1105-1106) and at times threatened to take the business elsewhere (App. 1108-1109).

The stock of International was owned by the Govin family, the members of which lived in places remote from Wilkes-Barre where its main plant was located (App. 1110). The members of the family made no capital investment in the company after their initial loan to commence operations was repaid (App. 1109-1110). They insisted on withdrawing a considerable portion of what profits there were as dividends.

By 1955 with the working capital of International seriously impaired, with the owners of the business unwilling to make needed investments for modernization and expansion and faced with a deteriorating situation, Mr. Gorman sought and tried hard to sell the business to Hearst (App. 1112). Hearst "rejected constantly his importunities to buy the plant." (App. 1112). Knowing of no other potential purchaser (App. 1116). Mr. Gorman then approached Mr. Koessler of Greater Buffalo in his efforts to sell the business (App. 1113-1114). Mr. Gorman said that as a "matter of courtesy" he informed Mr. Nicht of his approach to Mr. Koessler (App. 1115). Negotiations be-

tween Mr. Gorman and Mr. Koessler resulted in the sale of the stock of International for its book value which was \$575,000. The sale was consummated on June 23, 1955 (App. 1117).

Summary of Argument

We contend that the District Court correctly defined the relevant market and that the acquisition of International by Greater Buffalo neither restrained competition between Greater Buffalo and King, nor eliminated competition between Greater Buffalo and International.

We contend further that under the peculiar characteristics and circumstances of the industry involved that the effect of such acquisition did not and could not substantially lessen competition or tend to create a monopoly, and further that any minimal or transitory anti-competitive effects of the acquisition have long since been dissipated.

Finally, we contend that there is nothing in the circumstances of this case which justifies the divestiture relief sought for the purpose of creating a "viable independent color comic supplement printer capable of providing King with an alternate source of printing from Greater Buffalo."* In this connection we believe it is clear that there should be no divestiture of either the assets owned by International at the time of the acquisition or divestiture of the Sylacavga plant built by Greater Buffalo with its own resources five years after Greater Buffalo purchased International.

* Government's brief, p. 37.

ARGUMENT.**I.****The Relevant Market.**

The Government evidently made no survey of the market. It offered nothing that purported to be the result of a market study or a survey on its own part. Instead, it relied only upon some figures compiled from an informal so-called survey made by International (Government's brief, p. 11). Exhibit P-63, App. 1824 is a letter transmitting this so-called survey to Mr. Koessler and the letter calls attention to the survey's infirmities. The survey was characterized by Mr. Hammond as "very unreliable" and "fraught with nothing but guesswork." (App. 115-116). The Government does not state whether the figures appearing are weekly figures or annual. The fact is that they are weekly (App. 189).

We believe that the Trial Court was correct in its following statement:

"Examining all the testimony and the relations between the parties, the court finds that the significant lines of commerce involved in this action should be divided into two distinct and separate categories: (1) the printing of color comic supplements for newspapers which do not print their own, and (2) the printing of color comic supplements for syndicates engaged in the sale of copyrighted comic features to newspapers. These are the lines of commerce—to treat them together as one line of commerce, *i.e.*, the printing and sale of color comic supplements, would be to ignore the tremendous leverage of the syndicates which control the copyrighted features. The testimony of Walter Koessler and other witnesses in his case has established firmly that the syndicates, and in particular King, have a unique position by virtue of the legal monopoly which they have over the copyrighted features. The court is of the opinion that the

peculiar characteristics and business uses of copyrighted features justify considering printing for syndicates as a separate product market" (App. 1696-1697).

Accordingly, International and Greater Buffalo were not in competition one with the other prior to the acquisition. It should be noted that the complaint charges that the competition claimed to have been eliminated by the acquisition is that "between the defendants Greater Buffalo and International" (Paragraph 27, App. 12). This same allegation was carried over into the amended complaint filed four years later (Paragraph 27, App. 1605). This is the claim that the defendant was called upon to meet and successfully did meet at the trial. In the Government's brief to this Court the charge seems to be that the acquisition of International violated Section 7 of the Clayton Act because it restrained competition between Greater Buffalo and King. Furthermore it is interesting to note that in its jurisdictional statement the Government stressed the "impact of the merger (acquisition) upon competition in the selling market." (Government brief p. 19). At page 22 of the Government's brief the statement is made that "In this case the competition most substantially and dramatically lessened by the acquisition was between Greater Buffalo and King in the sale of comic supplemental printing, which was a vital aspect of the printing business." In other words, the claimed restraint is still in the selling market. It is clear that International did not engage in the selling market but was merely a captive printer for King. It had no salesman. It had no contracts with newspapers. It had no means of acquiring such contracts. In its post trial brief to the District Court the Government argued that printing and selling were separate markets (plaintiff's post trial brief, pp. 3-14). In its brief to this Court Government counsel withdraws these arguments by stating

that they "seem artificial and unimportant" (Government brief p. 19). Here again we are met with one of the ever changing Government contentions.

Whatever the market may have been, the District Court correctly found that Greater Buffalo, in acquiring International, did not acquire an additional share of the market because it had no assurance that King would continue to do business with International (App. 1701-1702). It is true that Greater Buffalo had high hopes of obtaining King's business for International—in fact, Greater Buffalo was negotiating with King for such business. The stubborn fact persists, however, that Greater Buffalo did not have a contract with King at the time of the acquisition, or, as the Government puts it at p. 33 of its brief, a "legally enforceable right to King's business", and therefore took a calculated business risk in purchasing International (App. 876).

II.

The acquisition did not have the effect of substantially lessening competition or did it tend to create a monopoly. Furthermore, any anti-competitive effects of the acquisition have long since been eliminated or significantly mitigated by subsequent events.

The structure of the relevant market, whether it be the market found by the trial court or that now contended for by the Government, makes it clear that any alleged anti-competitive effects of the acquisition could not in the nature of things be significant. Under the peculiar circumstances prevailing in this industry even reliable percentage figures alone would tell nothing about the conditions of entry. It was established at the trial, and is not effectively disputed

in the Government's brief* to this Court that "any newspaper can readily enter the market" (App. 499, 864). It was further established that some newspapers for which Greater Buffalo has printed have "gone back to printing their own" (App. 864)—all others could (App. 920). In addition, many newspapers have a capacity not only to print their own color comic supplements, but the capacity to print for other newspapers, as, for example, in the case of the Ft. Worth Star Telegram which prints for other papers (App. 1823). Footnote designated "7" at p. 11 of the Government's brief makes reference to printing done by newspapers for "other newspapers."

In view of the fact that the intended beneficiary of the relief sought in this action seems to be Hearst,** we call attention to the important fact that the *Government's* exhibit P-6 contains the following legend:

"Column 3 shows Hearst plants as color comic printers, for the reason that the Chicago American and Pittsburgh Sun-Telegram, both non-Hearst newspapers, are printed in the Hearst Chicago plant. These runs total 2,956,434 copies in 4's.

Further—Hearst plants having a surplus capacity of 12,500,000, *thus are capable of handling this output for King, a Hearst Division*" (App. 1823) (italics ours).

The record establishes the fact that healthy and vigorous competition has prevailed throughout the industry since the acquisition (App. 1241-1244). For example, Southern Color Print, which company, according to the Government's chart on page 11 of its brief, was printing only 477,714 four-page sections at the time of the acquisition, was printing 3,400,000 such sections at the time of the

* See pp. 28-29 of Government's brief

** See discussion *infra*, IV.

trial in 1965* (App. 1215). This business was taken by Southern Color Print in competition from Greater Buffalo (Dixie Color) (App. 1215, 1242). Star Color Printing (not even mentioned in the Government's chart at p. 11 of its brief) which was in business in 1955 took substantial business from Greater Buffalo between 1955 and the time of the trial (App. 1242). Greater Buffalo lost business to all of these companies between 1955 and the time of the trial (App. 1241-1244). Acme Color Press which according to the Government's dubious chart was printing 5,001,714 sections in 1955, had built a new plant and added new equipment (App. 1126) and was printing 7,700,000 sections at the time of the trial (App. 425). All of the other companies which were factors in the business in 1955 were factors at the time of the trial, including World Color Press, Bridgeport Color Press and others (App. 1241-1243). Subsequent to 1955 and before the trial Eastern Color Printing Company added to its capacity several single presses and at the time of the trial was installing a "new \$1,000,000 press completed by Hoe and Company" (App. 1126).

Mr. Jack Hornaday, whose original complaint against King (Hearst) occasioned this litigation, described the competition between Southern Color Print and Greater Buffalo in important part at App. 366. He said in some cases his product was better than that of Greater Buffalo; that they "look about the same"; and further that they are "not enough different to make the reader of a newspaper or ordinarily the publisher of a newspaper to see any great difference in them" (App. 366). He said that in some cases he could give better service because he

*Translated into dollars, Southern Color Print was doing \$600,000 in point of volume in 1955 and at the time of the trial it was grossing \$3,300,000 for its printing (App. 1126).

was closer to the customer and that although Southern Color Print didn't print for as many papers as did Greater Buffalo, Southern Color Print could therefore "probably give a little more individual service" than Greater Buffalo could (App. 366). He said that he could not point to a single act or deed on the part of Greater Buffalo Press, International Color Printing or Dixie Color Printing of which he would complain or which he would "even criticize" (App. 365).

It was on the basis of the foregoing and the testimony of many witnesses all of whom had been in the color printing business for over three decades that the District Court was able to evaluate the effect of the acquisition made ten years earlier on competition in the industry as a whole. The court had not only the testimony of Mr. Koessler and Mr. Gorman whose experience totaled 85 years but also the testimony of Jack Hornaday of Atlantic, Robert Smith of Southern Color and Earl Anderson of NEA. These witnesses constantly referred to the loss to one another of accounts among the various competing printers and syndicates. To prevail, it was incumbent upon the Government to prove that the acquisition of International by Greater Buffalo had a reasonable probability of substantially reducing competition. A mere possibility would not be enough. *United States v. DuPont De Nemours & Co.*, 353 U. S. 586, 598 (1957); *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U. S. 592, 598 (1965). Indeed, the testimony convincingly demonstrated that the color comic supplement industry is "a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals". *United States v. El Paso Natural Gas Co.*, 376 U. S. 651, 659 (1964). Because the syndicates including King and NEA were able

to have their supplements furnished by a printer of higher quality on which they could dependably rely for delivery to their customers and because the product which they furnished to newspapers of smaller circulation via the "make-ready" process was stabilized and improved, the possibility of anti-competitive effects flowing from the acquisition was balanced by the spirited competition among all the remaining competitors which the evidence showed had prevailed in the intervening ten years. The witnesses testifying to this competition had all spent their business careers in the trade and were "skilled in the business which they have carried on . . . [a]nd since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted." *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291 at 299 (1930). The District Court gave full credit to this voluminous testimony and concluded (App. 1702) that

"The acquisition by Greater Buffalo of International and its operation by Greater Buffalo over the past fifteen years have not resulted in the lessening of competition in the color comic supplement industry and, in fact, competition between Greater Buffalo, King, NEA, Southern, Acme, Eastern and the other companies engaged in the industry has increased. Indeed from all the evidence, it appears that the companies across the country have benefited, and that competition prevails in the industry unfettered by any agreement by any of the principals in this case."

III.

International if not a "failing company" was destined to become one.

While International was not insolvent within the bankruptcy sense of the term and was probably not a "failing company" within the strict application of the rule announced by this court in *Citizens' Publishing Co. v. United States*, 394 U. S. 131, 138 (1970), it was fading rapidly as a competitive factor in the industry. Its working capital was impaired, indeed substantially depleted. Its machinery was obsolete. Its only customer, Hearst, was about to take its business elsewhere (App. 1108-1109). As observed at page 34 of the Government's brief, International's growth had "stagnated." Certainly its outlook was dim, and its ultimate failure was reasonably predictable. The man in the best position to know, Mr. Gorman, who evidenced a complete knowledge of the industry, knew of no purchaser other than Greater Buffalo (App. 1116).

Government counsel argues that International's failure was hardly possible so long as King remained dependent upon International for printing but King was not dependent upon International for printing. See detailed discussion, *infra*. Important to be remembered is the fact that International was first offered to King and King would not negotiate for its purchase at any price (App. 1112-1113). Certainly within the context of this case and under the peculiar circumstances of this industry International was a failing company within the ordinary meaning of the term and the strict application of the rule of the *Citizens Publishing Co.* case should not be applied.

IV.

The divestiture of neither Dixie Color nor any of the assets of International at the time of the acquisition is called for or justified in the circumstances of this case.

We are astonished to read at p. 37 of the Government's brief the following statement:

"Effective relief in this case—which should create a viable independent color comic supplement printer capable of providing *King* with an alternate source of printing from Greater Buffalo—requires divestiture of both the assets owned by International at the time of the acquisition and the Sylacauga, Alabama plant planned by International, but *constructed and operated after the acquisition by Dixie Color Printing Corp., a Greater Buffalo subsidiary*" (Italics ours).

This statement is cumulative to the effect that the intended beneficiary of the Government's action is the wrongdoer whose conduct occasioned the commencement of the action.* Furthermore the Government's statement is preposterous in the light of the fact that Hearst, of which King is a mere division, has by virtue of its color printing plants in Chicago, San Francisco and other idle equipment, the capacity, indeed the excess capacity, with which to constitute itself an "alternate source of printing." (Testimony of Gorman, App. 1109, 1128, 1132-1133; Ex. P-6, App. 1708 at 1777, 1823; Ex. P-103, App. 1523-1529; Ex. P-104, App. 1529-1530; Ex. P-105, App. 1530-1532; Ex. P-106, App. 1532-1537; testimony of Hammond, App. 246, 248; deposition of Hornaday, May 29, 1961, index No. 90, vol. 1, p. 120; Findings of Fact, May 26, 1970, App. 1693.) Additionally, Hearst could turn to some or all of the other printers, including Acme Color Printing Company, Eastern Color Printing Company, Star Printing Company, Southern Color Printing Company and World Color Printing

Company (testimony of Gorman, App. 1108; testimony of Koessler, App. 862-863; testimony of Clinton, App. 221; Findings of Fact, May 26, 1970, App. 1696). In fact King from time to time threatened so to do (App. 1108-1109).

The statement at p. 40 of the Government's brief that the Sylacauga plant "was more the realization of International's plans than Greater Buffalo's, and must be viewed as a fruit of the unlawful acquisition", is contrary to the finding of the trial court (App. 1700) and is made against the overwhelming weight of the evidence. Since transportation costs have always been and are an important element in the ability of a printer to sell his product, Greater Buffalo long before its acquisition of International, planned and furthermore committed itself to build a plant in the south (Ex. D-5, App. 1592 Received in Evidence App. 888).

As early as 1947 (eight years before Greater Buffalo purchased International) Kenneth Koessler of Greater Buffalo made an extensive tour of the South in company with a representative of NEA which at that time was considering entering into a joint venture with Greater Buffalo for the construction of a plant in that area (App. 231, 869-870.) They made a report on locations, costs and the time required to put a plant on a paying basis (App. 870). NEA was unwilling to make such an investment and undertake the risk; hence, the proposed joint venture as such came to naught (App. 870).

Greater Buffalo was prevented at that time from going forward on its own because of the acute shortage of newsprint in that area and temporarily directed its interest to the building of a plant in Lufkin, Texas (App. 871). It

* As the trial court observed, "No reason has ever been presented by the Department of Justice to explain the significant change of heart towards the defendant Hearst." (App. 1692.)

did not, however, abandon its plans for a facility in the deep south and in November of 1950 (five years before its acquisition of International) made a firm commitment to the Journal Constitution, an Atlanta newspaper, to erect such facilities *as soon as newsprint was available and the government building restrictions, imposed, as a consequence of the Korean War, permitted* (App. 871, D-5, App. 1592, Received in Evidence, App. 888).

It was therefore, firmly established that in 1950 Greater Buffalo was committed to a southern plant and intended to open such a plant when economic conditions would permit it (App. 872).

In 1953 or early 1954, prior to the time that the acquisition of International was even considered, Ralph Watt, the general manager of the Coosa River Paper Company, came to Buffalo to interest Greater Buffalo in the construction of a plant in Sylacauga (App. 872-873). He advised Koessler that his company was planning to increase its capacity and was seeking business to utilize the additional newsprint that would be available on the completion of their additional paper machines (App. 872-874). Watt was familiar with the arrangement Greater Buffalo had concluded with Southland Paper Company at Lufkin and suggested that his company would make a similar proposal to help finance the construction of a printing plant and to sell newsprint at the standard rates less the transportation costs the mill traditionally afforded newspapers (App. 872-874). Koessler informed Watt that Greater Buffalo was interested in such a plant (App. 873). By that time Greater Buffalo was deeply involved in the planning and construction of the Lufkin plant and no immediate steps were then taken to progress the Sylacauga proposal (App. 872).

We cheerfully concede that in the meantime Gorman acting for International, and at the insistence of Nicht, was investigating the possibility of a plant in the deep south (App. 1118). The construction of such a plant by International became of interest to King by the middle of 1954 after King learned that Greater Buffalo had committed itself to the construction of a printing plant at Lufkin (Ex. P-53, App. 1474. Received in Evidence, App. 1141). King refused to either finance the erection of an International plant in the south or negotiate with International a long term contract at rates which would permit the financing of such a plant (App. 1118-19). The fact that International had never entered into a commitment to erect a plant at Sylacauga or any other place in the south was firmly established by the testimony and by every pertinent document in evidence in this case. Gorman's testimony on this subject is summed up in the following excerpt:

"Q. Let me ask you a flat question. At the time of the acquisition of the stock of International by Greater Buffalo, did International have any commitment of any kind to build a plant in Sylacauga?

A. Never. International never had a commitment of any kind at any time to build a plant in Sylacauga.

Q. Did they have the means to finance the building?

A. Did not have the means.

Q. Was Hearst willing to finance the building?

A. Hearst was not" (App. 1119, see also App. 1183).

The paper company at one time proposed to sell newsprint at less than the market price and to advance the monies necessary for the construction of a plant provided it was underwritten by Hearst, but this offer was almost immediately withdrawn (App. 1146-1148, 1173-1174). As a matter of fact the paper company would not even sign a

contract with International but did sign one with Hearst in December of 1954 to supply newsprint at the market price (App. 1148). This contract incidentally was never utilized and was not assigned to either Greater Buffalo or International (App. 188). The Sylacauga plant built by Greater Buffalo eventually obtained its newsprint from the paper company on an entirely different basis and no benefit accrued to either International or Greater Buffalo from the contract between Hearst and Coosa River Paper Company (App. 873-874, 1169-1170).

Subsequent to the acquisition of International by Greater Buffalo in June of 1955 Gorman, at the direction of Koessler, made a further and intensive investigation of areas in the south, looking toward the establishment of a southern plant for Greater Buffalo. He visited Chattanooga, Knoxville, Nashville and Cleveland, Tennessee, among other places (App. 1121). In connection with this investigation and on July 15, 1955, after the acquisition Gorman wrote 30 letters to various cities in Tennessee asking them for the same concessions that were available to any company erecting a paper plant in Sylacauga (App. 1183-84). At the conclusion of this investigation and in the latter part of 1955 or early 1956 Gorman reported to Koessler and recommended Sylacauga as the best location for a plant (App. 1121). Koessler on the other hand felt that the plant should be in Chattanooga or in Nashville near a source of newsprint to be supplied by the Bowater Paper Company but in the last analysis he deferred to Gorman's wishes and it was determined that Greater Buffalo through a wholly-owned subsidiary, Dixie Color Printing Company, would build the plant in Sylacauga (App. 1121).

Early in 1956, Hammond, who was the financial officer of Greater Buffalo and who had had no previous connection

with International, accompanied Gorman to Sylacauga and consulted an attorney for the purpose of organizing Dixie Color Printing Company (App. 233). This company was organized and financed as a wholly-owned subsidiary of Greater Buffalo which has at all times owned all of the company's capital stock (App. 234). Although Gorman and Clinton, an employee of International, were on the original board of directors of the company, the majority of the board was controlled by the officers of Greater Buffalo including both the Koesslers and Hammond (App. 233-234).

Subsequently, the Sylacauga plant was constructed entirely under the direction of Greater Buffalo. Although certain of the work was carried out at International, that company was by that time a subsidiary of Greater Buffalo, and was reimbursed for all of its expenses incurred in the preparation of the machinery to be used at Sylacauga (App. 234-239, Ex. D6, D7, D8 Received in evidence App. 236, 238, 239). This includes Press 2022 which was purchased *after* the acquisition at the direction of Mr. Koessler (App. 155-156, 1192, see also App. 59-61, 69-70). Both the plans of the plant and the reconstruction of the press to be used were in fact a duplication of Greater Buffalo's Lufkin plant (App. 1122). The construction was financed entirely by Greater Buffalo Press (App. 234).

The government contends that the construction of Greater Buffalo's plant at Sylacauga was made possible only by the acquisition of International (Government Brief 14, 38). The plain fact is that both the Coosa River Paper Company and the City of Sylacauga could not have cared less whether the printing plant was owned and operated by a company named International or by any other company. This is illustrated by Clinton's testimony

that the people in Sylacauga referred to the facility as the "funny paper plant" (App. 223, 227). The paper company was interested in selling newsprint and the city was seeking an industry which would afford jobs (App. 872). When Mr. Koessler determined to double the size of the plant and pattern it after the Lufkin plant the Chamber of Commerce readily raised the money to purchase and grade the necessary land and conveyed the title to it to Greater Buffalo (App. 195).

Government trial counsel argued that the Sylacauga plant was some kind of "birth-right" acquired from International and made the claim that "when Greater Buffalo came in they changed certain details and provided certain things" (App. 1205). The validity of this argument may be gauged by the fact that the "details" that were changed consisted of the size of the plant which was greatly increased (App. 1122), the plan of the plant and the design of the press incorporating Greater Buffalo's unique preregistry system (App. 192). In addition, the "certain things" provided by Greater Buffalo consisted of the money without which the plant could not have been built (App. 194) and the know-how without which it could never have been successfully operated (App. 62).

As we have noted above, Greater Buffalo was committed as early as 1950 to construct a plant in the deep south and at the time Sylacauga was opened Greater Buffalo held the following printing contracts which were at the time of the trial being produced by its wholly-owned subsidiary Dixie Color Printing Corporation at Sylacauga (Ex. D-3 Received in Evidence App. 877):

The Atlanta Journal	525,000	Circulation
The Birmingham News	230,000	"
The Columbus Dispatch	300,000	"
The Miami Herald	410,000	"
The Louisville Courier-Journal	330,000	"
The Washington Star	340,000	"
The Mobile Press Register	95,000	"
The Nashville Tennessean	225,000	"
The Memphis Commercial Appeal	270,000	"
The Knoxville Journal	150,000	"
The Norfolk Virginian Pilot	160,000	"
The Cincinnati Enquirer	310,000	"
<hr/>		
Total	3,345,000	

When the prospect of Sylacauga became a reality to King Mr. Nicht made desperate attempts to negotiate an agreement with Greater Buffalo which would give King the right to be the exclusive sales agent for the printing at that plant and would prevent NEA from using Greater Buffalo's southern facilities. When this attempt failed, King joined in the government's application to prevent the opening of the Sylacauga plant. After the District Court apropos an application to vacate a preliminary injunction permitted the limited operation of the Sylacauga facilities King was let out of the case with an innocuous consent decree and now expectantly awaits the outcome of the government's efforts to afford it an "option" to purchase the plant through the medium of a divestiture order.

The circumstance that the Sylacauga plant constructed five years after the acquisition and operated independently of King and without any restraint or allocation of customers is further illustrated by the fact that in addition to the circulation of 3,345,000 printed through contracts held by Greater Buffalo Press it is presently printing for papers having a circulation of 852,000 on contracts held by King and for papers having a circulation of 330,000 on

contracts held by NEA (Ex. D-3 Received in Evidence App. 877). Thus, 74% of the supplement printing at Sylacauga is on Greater Buffalo contracts, 19% on King contracts and 7% on NEA contracts. Moreover, 30% of the printing done at Sylacauga consists of commercial business unrelated to color comic supplements all of which has been obtained and placed by Greater Buffalo and if this printing is taken into account Greater Buffalo is supplying 82% of the Sylacauga business, King 13% and NEA 5% (Ex. D-3 Received in Evidence App. 877).

The limited operation of the Sylacauga plant effected transportation savings to newspapers in the area of approximately one quarter of a million dollars each year (App. 875). The plant affords direct employment to approximately 75 people and purchases over \$2,000,000 of newsprint in the south (App. 875).

On February 19, 1963, the District Court, after the taking of testimony on the motion of Greater Buffalo to lift a Preliminary Injunction made the following findings of fact:

"3. The public interest requires that the Sylacauga plant be permitted to open and operate under conditions that will afford an opportunity for it to be operated in open and fair competition in the business of printing color comic supplements in the southeastern area of the United States."

"4. The unrestricted operation of the Sylacauga plant by Greater Buffalo Press, Incorporated or its subsidiary Dixie Color Printing Corporation will not cause damage or injury to Southern Color Printing Corporation or Atlantic Features and Printing Company and the continuance of the preliminary injunction is not necessary for the protection of either of these companies or for the maintenance of effective competition in the color comic supplement industry in the southeastern portion of the United States."

"7. The operation of the restraining order and the preliminary injunction has restricted competition in the sale and printing of color comic supplements in the southeastern part of the United States and has deprived newspaper publishers of the benefit of such competition, including substantial savings in transportation costs." (Order dated February 19, 1963 App. 513, 514-515).

Thus the District Court found that the unrestricted operation of the Sylacauga plant by Greater Buffalo will not effect competition and these findings eliminate any basis for the divestiture sought by the government in this action. The record developed at the trial on the merits substantially buttressed these findings and no grounds exist for vacating them. The record amply demonstrates that healthy competition exists between NEA, King, Southern and Greater Buffalo for printing in the southeast and the government can point to not a single complaint with respect to a restrictive or predatory practice on the part of Greater Buffalo.

It is undisputed that the construction of Sylacauga was undertaken five years subsequent to the acquisition of International by Greater Buffalo and that the building and the machinery were paid for by Greater Buffalo (Ex. D-6, D-7, D-8 Received in Evidence 236, 238, 239). Title to the property was acquired by Dixie Color Printing Company, a Greater Buffalo subsidiary which was entirely unrelated to International, and none of the assets which International owned prior to its acquisition except two or three items of negligible value were incorporated into the new facility of Sylacauga (App. 196-204 Proceedings of October 26, 1961 Ex. D-3 Received in Evidence App. 204). Under these circumstances it is well established that equitable principles as well as constitutional considerations flowing from the due process clause foreclose the imposition

of the sanction of divestiture with respect to property acquired subsequent to an acquisition even if the acquisition could be found to be in violation of Section 7 of the Clayton Act. *Reynolds Metals Company v. Federal Trade Commission*, 309 F. 2d 233 (DC Cir. 1962). As we have demonstrated, the facts established and found in the case at bar are very different from the facts found in *United States v. Aluminum Company of America*, 247 F. Supp. 308 (E. D. Mo.), *aff'd* 382 U. S. 12, cited at pp. 38-39 of the Government's brief.

We believe that all that was said by Judge Burger on the subject of the divestiture of a "new plant built after the acquisition" in *Reynolds Metals Company v. Federal Trade Commission*, 309 F. 2d 223, 230 (1962) applies to the case at bar. The obsolete presses and equipment owned by International at the time of the purchase of International's stock by Greater Buffalo, like the assets of Arrow in the *Reynolds* case, are separable from "after acquired assets" in the Sylacauga plant. It is only whatever assets were at the Wilkes-Barre plant at the time of the acquisition that could be the subject of a divestiture, even if a case for any divestiture had ^{been} ~~then~~ made out.

The case at bar presents a far stronger position for the denial of divestiture than the *Reynolds* case. Sylacauga was not designed or intended to house the previously existing assets or equipment of International, nor was it used for such a purpose. Moreover, the Sylacauga plant was not set up to service International's accounts, a circumstance which is clearly demonstrated by the fact that 87% of its present volume consists of printing Greater Buffalo and NEA work which had never been printed at the International plant at Wilkes-Barre (Ex. D-3 Received in Evidence App. 877).

In the light of all of these circumstances it is submitted that the government has failed to sustain the burden of demonstrating why Greater Buffalo should be deprived by a divestiture order of the fruits of a calculated business risk upon which it has expended in the neighborhood of \$3,000,000.

Certainly there is nothing in antitrust law that makes anything and everything conceived or dreamed of by an acquired company, no matter how impossible of accomplishment by it, forbidden fruit for the acquiring company, especially where the acquiring company had conceived of the same thing before the acquired company did so and proceeded *after* the acquisition with its own resources to a fulfillment of the concept.

Having established, as we believe we have, that under no circumstances can there be a divestiture order with respect to Sylacauga, we turn to the argument of the Government that there should be a divestiture order with respect to the "assets owned by International at the time of the acquisition."^{*} We believe that we have demonstrated that there was no violation of Section 7 of the Clayton Act and that there were no anti-competitive effects flowing from such acquisition. We believe we have also established that in the context of this case International was in the nature of a "failing company." Furthermore, and importantly, much that we have said concerning the inequity of an order directing divestiture on the part of Greater Buffalo for the benefit of King of the Sylacauga plant applies to any divestiture of the acquired assets of International.

Importantly bearing on the matter of the requested divestiture Government trial counsel based his request for

^{*} Quoted language is from the bottom of p. 37 and top of p. 38 of Government's brief.

the same largely upon suggested findings that Greater Buffalo had conspired to monopolize the business. The District Court found that Greater Buffalo had not so conspired and no appeal has been taken from such findings. See footnote designated "3", page 5 of Government's brief and footnote designated "2" at page 4 of Government's jurisdictional statement pertaining to admitted "changed circumstances since the complaint was filed."

The Government on this appeal harks back to a similar attempt at the trial and in so many words seeks to *equate* "Effective relief in this case" with something which it says will "create a viable independent color comic supplement printer capable of providing *King* with an alternate source of printing from Greater Buffalo" (Government's brief p. 37 *italics ours*).^{*} This is the first case which our research discloses in which the drastic remedy of divestiture is sought against one described as a "victim" in favor of one conceded to be a predator—to say nothing of the fact that the predator was given and refused the opportunity to buy the acquired company (App. 1112-1113).

The Government's effort to make Hearst a printer for King is especially incongruous in the light of the fixed and determined policy of Hearst not to print for King (App. 1112-1113). Mr. Gorman testified that Hearst "rejected constantly his importunities to buy the (International) plant" (App. 1112). Mr. Nicht's superior, a Mr. Greene, said that the "printing business was a headache" and indicated that Hearst's interests would not be served by

^{*}In all good humor we observe that it is hard to reconcile this misdirected bit of knight errantry with government trial counsel's statement to the effect that "*If King was before this court it would be thrown out*" (R. 667).

Trial counsel in the course of his remarks to the District Court stated "Greater Buffalo is the *victim* to the extent NEA and King can tie in" (R. 667).

going into the business (App. 1113). In reaching such decision Mr. Greene pointed out that "Woolworth's sold 50,000,000 gumdrops a year and never made one and made money" (App. 1113).

Conclusion

During the course of this protracted litigation the operations of the color comic supplement industry have been the subject of painstaking scrutiny for more than ten years. It is submitted that the record herein discloses not only that healthy and intense competition prevails in the industry but also that by virtue of the force of circumstances, including *easy actual and potential entry* by newspapers, the industry is relatively immune to threats of monopoly or restraint of trade. In addition, the facts developed lend support to the heartening conclusion that a small family business enterprise without recourse to outside financing can still attain and preserve a significant position in industry through its ability to produce a good product at a reasonable price. This has been the traditional genius of the free enterprise system and this record demonstrates that it still flourishes. The present litigation and the vigorous manner in which it has been pursued by the Antitrust Division of the Department of Justice have at least accomplished a result to the extent that it has been once again demonstrated that under our system of government all phases of economic and industrial activity are constantly subject to governmental investigation with respect to the freedom of competition that prevails in a particular phase of commerce. Greater Buffalo Press has been called to account for the conduct of its business affairs and has demonstrated conclusively in this litigation that its operations have resulted in neither monopoly nor any re-

straint of competition;* in fact, the only inference that can be drawn from this record is that Greater Buffalo Press and the innovations it has effected in the industry have resulted in fostering competition and challenging the dominance of the large corporate enterprise which formerly controlled the field of color comic supplements.

In the light of all of the circumstances it is submitted that the judgment appealed from should be affirmed.

Dated: April 8, 1970.

Respectfully submitted,

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*Mr. Jack Hornaday, whose original complaints against King (Hearst) occasioned this action, testified six years after the acquisition in part as follows:

"Q. —can you tell me a single act or deed on the part of the Greater Buffalo Press, International Color Printing or Dixie Color Printing, of which you complain or which you would even criticize?

"A. No, I don't recall anything, sir" (App. 365).